

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Annual Assessment of the Status of
Competition in the Market for the
Delivery of Video Programming

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MB Docket No. 07-269

**REPLY COMMENTS OF
THE NEW JERSEY DIVISION OF RATE COUNSEL**

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EXECUTIVE SUMMARY

Despite the plethora of video platforms and innovations that initial comments describe, the market for the delivery of video programming is not yet effectively competitive. Concentrated ownership and control of the broadband pipes that are necessary for the emerging online video distribution systems, skewed retransmission consent negotiations, and excessive cable prices provide some of the evidence of market failures. The New Jersey Division of Rate Counsel fully supports the Federal Communications Commission's ongoing collection and analysis of data to assist it in identifying barriers to effective competition and in ensuring that consumers have access to diverse, local, and affordable video programming.

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I. INTRODUCTION

The New Jersey Division of Rate Counsel (“Rate Counsel”) hereby responds to initial comments submitted in response to the Further Notice of Inquiry (“Further Notice”) issued by the Federal Communications Commission (“FCC” or “Commission”) seeking data, information, and comment on the state of competition in the delivery of video programming for the Commission’s Fourteenth Report (“14th Report”).¹ Based on its review of diverse comments,²

¹ / *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Further Notice of Inquiry, FCC 11-65, released April 21, 2011 (“Further Notice”). Rate Counsel submitted initial comments on June 8, 2011.

² / California Public Utilities Commission and the People of the State of California (“CPUC”); Comcast Corporation (“Comcast”); Counties of Anne Arundel and Montgomery County, Maryland and the cities of Boston, Massachusetts and Laredo, Texas (the “Communities”); DIRECTV, Inc. (“DIRECTV”); Hiawatha Broadband Corporation, Inc., National Rural Telecommunications Cooperative, Rural Broadband Alliance, and Rural Independent Competitive Alliance (“Telcos”); the National Association of Broadcasters (“NAB”); the National Cable & Telecommunications Association (“NCTA”); the National Telecommunications Cooperative Association, the Independent Telephone and Telecommunications Alliance, the Organization for the Promotion and

Rate Counsel continues to welcome the FCC's efforts to obtain data to "provide a solid foundation for Commission policy making with respect to the delivery of video programming to consumers."³

Industry comments describe flourishing innovation,⁴ but differ as to the level of effective competition that exists.⁵ Rate Counsel welcomes the explosive growth in video services and platforms, but urges the Commission not to let this technological variety obfuscate the need for a close analysis of the level of competition that truly exists. Market imperfections continue, and if left unaddressed, will harm consumers by leading to yet higher prices, less local programming, and a loss of diversity.

Comprehensive statistics are essential to inform policy making. Competition varies by geographic market. For example, as DIRECTV observes, as of 2005, as many as half of persons living in multiple dwelling units ("MDU") could not receive direct broadcast satellite ("DBS") signals because of line-of-sight problems.⁶

Advancement of Small Telecommunications Companies, the Rural Independent Competitive Alliance, and the Western Telecommunications Alliance (the "Associations"); Netflix, Inc. ("Netflix"); Public Knowledge; and Verizon.

³ / *Further Notice*, at para. 1.

⁴ / *See, e.g.*, DIRECTV, at 3-8; Comcast, at 6-18.

⁵ / *See, e.g.*, Comcast, at 1 (referring to an "extremely competitive" video marketplace); NAB, at 1 (referring to "an intensely competitive video market"); NCTA, at 6 (referring to robust competition and to vibrant competition); Telcos, at 15-16 (discussing, among other things, tying).

⁶ / DIRECTV, at 9, citing United States Government Accountability Office, *Telecommunications: Direct Broadcast Satellite Subscribership Has Grown Rapidly, But Varies Across Different Types of Markets*, GAO-05-257 (April 2005).

II. VIDEO PROGRAMMING MARKET

The companies that provide high speed broadband possess unique and formidable advantages in video programming.

The NCTA relies in part on Internet-based delivery of content as evidence of competition.⁷ However, Rate Counsel shares DIRECTV's concern that market concentration in the provision of high speed broadband services and among programmers "could increasingly threaten competition in the market for multichannel video services."⁸ The FCC should consider the importance of broadband access in its assessment of the status of video competition. Online video distribution ("OVD") certainly represents an innovative and important new delivery mechanism for video programming, but as long as cable and telecommunications companies dominate the broadband market, the ability of OVD providers to discipline video programming markets is limited.

The control of broadband pipes provides an opportunity for discrimination against rivals.⁹ As Netflix explains: "The fact that broadband network operators, who are also MVPDs, control the delivery pipes and generate significant revenue from content that travels over those pipes provides such network operators with both the means and motive for discriminating against OVDs that might threaten that revenue."¹⁰ Cable operators particularly possess unique and formidable advantages because they offer higher speed broadband services than the digital

⁷ / NCTA, at 19-20; 23-25.

⁸ / DIRECTV, at 14; *see also, id.*, at 15-20.

⁹ / Public Knowledge, at 2.

¹⁰ / Netflix, at 1-2. *See also, id.*, at 5-8.

subscriber line (“DSL”) offerings of telecommunications companies. In many markets, cable companies are the sole fiber providers when telecommunications companies have not deployed fiber to the curb (*e.g.*, AT&T’s U-verse) or fiber to the home (*e.g.*, Verizon’s FiOS).

Broadband deployment varies significantly among diverse geographic markets.¹¹ Telecommunications companies do not offer fiber-based broadband access ubiquitously (and indeed have discontinued deploying fiber in new markets),¹² and, therefore, there is often not a fully competitive market with multiple providers.¹³ The Communities underscore the disparate deployment of fiber.¹⁴ Competitive alternatives indisputably vary among regions of the country, and, therefore, the Commission should not conclude that a seemingly competitive market in some areas is representative of all consumers’ experiences.

Furthermore, the FCC should assess the substantial link between broadband access and control of video programming. Clearly the ability to bundle broadband with video provides cable and telecommunications companies a distinct advantage over DBS-based video providers. Left unchecked, this market dynamic can thwart competition. Among other things, because of the negligible broadband competition that exists (which in turn allows supracompetitive broadband pricing), broadband providers can “more easily absorb programming costs, in particular skyrocketing retransmission consent fees.”¹⁵ Transparency in retransmission fees is

¹¹ / See, *e.g.*, Associations , at 3 (demonstrating relationship of unreasonable terms and conditions on rural providers’ ability to offer service); and CPUC, at 1-4 (demonstrating that rural areas are more likely to be unserved by video providers).

¹² / Communities, at 14-15.

¹³ / DIRECTV, at 18.

¹⁴ / Communities, at 7; *see also* NAB, at 4 (discussing lack of broadband deployment in many rural areas).

¹⁵ / DIRECTV, at 19.

essential for a well-functioning market.¹⁶ Improved cost allocation reporting also would assist the Commission in monitoring anticompetitive cross-subsidization.

Furthermore, as the Communities observe, and contrary to the NCTA's assertion that there is "fierce competition" among multichannel video programming distributors ("MVPD") and the two large DBS companies,¹⁷ satellite does not provide an effective alternative for all consumers because of topographic challenges and also because satellite providers do not provide public, educational and governmental ("PEG") channels.¹⁸

Public interest programming.

In initial comments, the Communities raise concerns about cable operators' discrimination against PEG channels,¹⁹ and specifically urge the Commission to act on petitions for declaratory ruling that have been pending since February 2009 regarding the requirements of the Cable Act with respect to the carriage of PEG access channels.²⁰ Rate Counsel supports the Communities' request that the Commission declare "that PEG channels should be delivered to the public in a manner equivalent to the manner in which broadcast channels are delivered."²¹

¹⁶ / Associations, at 9-11 (discussing, among other things, how "non-disclosure" clauses prevent rural MVPDs from knowing if the fees they pay are comparable to those paid by larger MVPDs); Telcos, at 2 (referring to the "confidentiality clauses that impede" them from providing "the Commission with complete details of the discriminatory terms they face").

¹⁷ / NCTA, at 16.

¹⁸ / Communities, at 16.

¹⁹ / *Id.*, at 11-13.

²⁰ / *Id.*, at 12, citing *In re Petition for Declaratory Ruling Regarding Public, Educational, and Governmental Programming*, MB Docket No. 09-13.

²¹ / Communities, at 12-13.

Rate Counsel also reiterates its request for information on the status of the FCC's review of digital transition rules prior to their sunset, pursuant to the FCC's *Digital Transmission Order*.²²

Rates, terms, and conditions provide a barometer for the level of competition that exists.

Regarding video programming prices, the deck certainly seems stacked against consumers. The seemingly competitive market (OVD, DBS, telecommunications carriers, and cable companies) belies the intensely concentrated control of must-have programming, the skewed retransmission consent fees,²³ and the monopolistic or duopolistic provision of the broadband access that is necessary for OVD. Innovation in platforms does not alter the control that exists in the video programming market. Furthermore, despite the complexity of tracking video prices,²⁴ it is essential for the Commission to monitor the prices that are actually charged to consumers to deter anticompetitive behavior and to adopt appropriate rules to deter supracompetitive prices and unreasonable terms and conditions.

Rate Counsel also echoes the Communities' well-documented concerns about rising cable prices,²⁵ and concurs with the Communities that "[b]ecause market forces alone are inadequate, the Commission and other bodies with regulatory authority – including local governments – must act in a range of areas to protect the public interest."²⁶

²² / *In the Matter of Carriage Digital Transmission Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order and Third Further Notice of Proposed Rule Making, FCC 07-170, 22 FCC Rcd 21064 (Rel. November 30, 2007). See letter from Rate Counsel, re Status of Digital Transition Review in Docket No. CS 98-120, June 15, 2011.

²³ / Verizon, at 18-20.

²⁴ / *Id.*, at 9-10.

²⁵ / Communities, at 10-11.

²⁶ / *Id.*, at 11.

Rate Counsel also supports the Associations' opposition to "forced tying and tiering by program providers"²⁷ and their recommendation that the Commission investigate anticompetitive tactics such as tying.²⁸ Consumers should have access to à la carte programming, and, therefore the Commission should ban forced tying.²⁹ Rate Counsel concurs with the Associations that "[r]ural MVPDs should be free to create and market video programming tiers as they see fit in order to meet the demands of their subscribers."³⁰ Furthermore programmers should not be permitted to require carriage on a designated level of service³¹ because such requirements inhibit competition and consumer choice.

Comprehensive data is essential to ensure that the market is functioning efficiently.

The FCC should continue to collect and analyze relevant data that measure competition, such as prices for cable services, the availability of PEG channels, the diversity of services, and the control of broadband access.

MVPD Conduct and Performance

Rate Counsel raised the concern in initial comments that "[t]here is no evidence that cable rates presently are just and reasonable, and common sense would suggest otherwise."³² Rate Counsel's review of initial comments does not alter this concern. Rate Counsel reiterates its recommendation that the FCC use as its reporting foundation, the Automated Reporting Management Information System reports that it required incumbent local exchange carriers to

²⁷ / Associations, at 3-5.

²⁸ / *Id.*, at 5.

²⁹ / *Id.*, at 6; Telcos, at 15-16.

³⁰ / Associations, at 8; *see also* Telcos, at 3-8.

³¹ / Telcos, at 9-11.

³² / Rate Counsel, at 5.

submit for many years. Companies' allocation of costs among video and non-video services directly affects reported profitability and also affects their ability to price in anticompetitive manners.³³

Online Video Distributors: Structure, Conduct, and Performance.

OVDs provide an alternative mechanism for consumers to obtain video programming. Initial comments diverge as to whether OVD provides a substitute for or complement to other programming.³⁴ In Rate Counsel's view, OVD is a significant new area but provides a complement to more "traditional" video programming. Must-have sports, news, and current television programs typically are not available through OVD, which means that OVD offers an additional service rather than a substitute service.

Regardless, Rate Counsel concurs with comments that recommend that the FCC "should be especially vigilant" in monitoring the emerging OVD market.³⁵ Among other things, the FCC should monitor the degree to which some companies may exercise excessive control over this fledgling market. Although it would seem to provide competition, certainly instances like Comcast's ownership of Hulu fundamentally shifts the degree to which OVD can constrain the prices and quality of more traditionally video programming. Furthermore, the FCC should

³³ / *Id.*, at para. 34.

³⁴ / *See, e.g.*, DIRECTV, at 22-24 (observing, among other things, at 24, that OVDs "will become increasingly viable substitutes for cable, fiber and DBS video service"); Google, at 2 (asserting that Internet video provides a complement); Netflix, at 5 (contending that OVDs "are a complement to and not a substitute for MVPD service"); and Public Knowledge, at 6 (asserting that OVD "remains complementary to traditional MVPD or broadcast programming, for most viewers").

³⁵ / *See, e.g.*, DIRECTV, at 21.

consider carefully which obligations that presently apply to traditional MVPDs should be extended to programming that is delivered over the Internet.³⁶

Carriage Fees.

Rate Counsel acknowledges the value of over-the-air (“OTA”) broadcasting, and its importance to many consumers,³⁷ but this significance does not diminish the compelling need to fix a flawed retransmission consent system.³⁸ Furthermore, reasonable rates, terms, and conditions for video content contribute to rural carriers’ decisions to deploy broadband Internet access services.³⁹ Rate Counsel submitted reply comments in the retransmission proceeding, and incorporates these comments by reference.⁴⁰ In the context of this proceeding, clearly, the ability of broadcasters to extract monopoly rents through the lopsided retransmission consent negotiation process that now exists affects the future and viability of video programming competition.⁴¹ The data collection envisioned by this proceeding is an important step to ensuring just and reasonable fees, terms, and conditions.

³⁶ / DIRECTV, at 24; Public Knowledge, at 8-9.

³⁷ / NAB, at 5 (stating that as June 2011, a total of 46 million Americans rely solely on OTA television reception); *id.*, at 7 (stating that 23 percent of homes with an annual income of less than \$30,000 rely solely on OTA TV signals); *id.*, at 9-13 (describing OTA’s role during weather emergencies); and *id.*, at 17 (describing broadcasters’ production and distribution of local journalism).

³⁸ / Telcos, at 14-15.

³⁹ / Associations, at 4.

⁴⁰ / Amendment of the Commission’s Rules Related to Retransmission Consent, Notice of Proposed Rulemaking, 26 FCC Rcd. 2718 (2011), Rate Counsel reply comments, June 27, 2011.

⁴¹ / *See, e.g.*, DIRECTV, at 25-27; *see also*, Associations at 3 (stating that “[s]uccessful video deployment requires access to desirable content under reasonable terms and conditions”).

Other Issues

Rate Counsel supports the collection of information such as the relative availability and prices of video programming in rural versus urban areas,⁴² the diversity of video content creators and video content aggregators,⁴³ the reasonableness of pricing for customer premises equipment (“CPE”),⁴⁴ and data on consumer behavior.⁴⁵ Among other things, the FCC should ensure that to the extent that CPE supports not only video programming, but also Internet-based voice services, costs should not be recovered exclusively from companies’ cable services. Consistent with part (j) of Section 76.924 of the FCC’s cable rules, the cost of unrelated expenses should be excluded from the cost categories that are used to develop rates for the provision of regulated cable service and common costs must be allocated in accordance with part (f) of Section 76.924 of the FCC’s rules.⁴⁶

AllVid proceeding.

Initial comments discuss the “AllVid” proceeding.⁴⁷ For example, DIRECTV raises the concern that the “AllVid” proceeding – “would mandate a *one-size-fits all* approach to navigation devices.”⁴⁸ Rate Counsel understands that the scope of this proceeding does not encompass “AllVid” issues. Therefore, Rate Counsel recommends that the Commission address these matters in the ongoing Notice of Inquiry proceeding.

⁴² / *Further Notice*, at paras. 56-59.

⁴³ / *Id.*, at paras. 60-63.

⁴⁴ / *Id.*, at paras. 64-67.

⁴⁵ / *Id.*, at paras. 68-69.

⁴⁶ / *See* 47 CFR §76.924(j).

⁴⁷ / *Video Device Competition*, Notice of Inquiry, 25 FCC Rcd. 4275 (2010). “AllVid” refers to an all-video standardized gateway interface. *See, e.g.*, DIRECTV, at 7; Google, at 7-9; Verizon, at 23-25.

⁴⁸ / DIRECTV, at 7, cite omitted, emphasis in original.

III. CONCLUSION

Rate Counsel welcomes the FCC's *Further Notice* and is hopeful that the *14th Report* will reflect fully the evolving technological and market structure changes in the video programming industry. Rate Counsel also urges the FCC to address market imperfections that stymie competition, affordable rates, and diversity including such market distortions as retransmission consent, excessive prices, and market concentration.

Respectfully submitted,

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